

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER**  
**BROWN** (Mailed 2/11/2003)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of Application of Pacific Bell  
Telephone Company (U-1001-C) for Arbitration  
with Pac-West Telecomm, Inc. (U5266-C)  
Pursuant to Section 252(b) of the  
Telecommunications Act of 1996.

Application 02-03-059  
(Filed April 18, 2002)

**DECISION APPROVING ARBITRATED AGREEMENT  
PURSUANT TO SECTION 252, SUBSECTION (e), OF THE  
TELECOMMUNICATIONS ACT OF 1996 (ACT)**

**Summary**

In this decision we modify and approve the arbitrated interconnection agreement (ICA) filed by Pacific Bell Telephone Company d/b/a SBC-California (SBC) and Pac-West Telecomm, Inc. (Pac-West), under Rule 4.2 of our Revised Rules Governing Filings made Pursuant to the Telecommunications Act of 1996 (Rules), pursuant to Subsection 252(e) of the Act. We find that the ICA does not violate the requirements of Section 251 of that Act, the Federal Communications Commission's (FCC) implementing regulations therefore, or the pricing standards set forth in Subsection 252(d) of the Act. However, we do find that the Final Arbitrator's Report finding on Issue 14 of the agreement is inconsistent with Commission policy established in prior interconnection agreement (ICA) cases, and therefore Issue 14 of the ICA shall be modified to comport with this decision and established Commission practice.

Application (A.) 02-03-059 is closed.

**Background and Procedural History**

As required by Subsection 252(e)(1) of the Act, in this decision we approve with modification the proposed ICA between SBC and Pac-West, following arbitration of certain issues the parties could not resolve through negotiation. Pac-West's previous ICA with SBC expired on June 29, 2001.

The history of the dispute, and a complete discussion of the parties and disputed issues, are set forth in detail in the Final Arbitrator's Report (FAR), which was filed on November 19, 2002. Rule 4.2.1 required the parties to file the entire agreement conforming to the FAR, and respective statements concerning approval or rejection of the proposed ICA, within seven days after issuance of the FAR. Both parties timely complied with these filing requirements, thus placing before us the task of approving or rejecting the ICA in its current form.<sup>1</sup>

Rule 4.2.1 specifies that each party's statement must indicate:

- a. the tests the Commission must use to measure an agreement for approval or rejection,
- b. whether the party believes the agreement passes or fails each test, and
- c. whether or not the agreement should be approved or rejected by the Commission.

SBC's comments state that under the Act an arbitrated ICA may be rejected by this Commission only if:

The agreement does not meet the requirements of section 251 [thereof], including the regulations prescribed by the [Federal

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<sup>1</sup> No comments were filed by any member of the public within ten days after the filing of the agreement, as permitted under Rule 4.2.1.

Communications Commission]...or the standards set forth in [Section 252(d)]. This test is mirrored by our Rule 4.2.3.<sup>2</sup>

Pac-West's comments do not state that there is any material flaw in the ICA, and Pac-West indicates that the Commission should approve the ICA in its current form. SBC's comments argue that the resolution of a single arbitrated issue, Issue 14, fails the test for Commission approval. SBC urges us to modify the outcome of this issue so that the ICA will comport with the requirements of the Act, and then adopt it. SBC argues that the ICA must be rejected if this change is not made.

## **Discussion**

### **a. Disputed Issue**

Issue number 14, as cast by the parties, asks whether SBC should be allowed to collect transport charges on calls destined to Pac-West customers with disparate rating and routing points. Consistent with the outcome in the GNAPs Arbitration, the Draft Arbitrator's Report found that SBC should receive transport charges from Pac-West for Virtual NXX (VNXX)<sup>3</sup> traffic pending FCC

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<sup>2</sup> Pac-West's comments state that a different standard applies to negotiated portions of an ICA than to arbitrated portions, but this approach is incorrect: Rule 4.3.1 specifies different and a much simpler process for Commission approval of a negotiated ICA, reflecting a clear distinction between a completely voluntary agreement and one that has been the subject of arbitration or mediation, in whole or in part. Simply put, insofar as arbitration is involved, an ICA is either virginal or it is not; there is no middle ground under our rules.

<sup>3</sup> VNXX is a form of Foreign Exchange service, where the purchaser of the VNXX is not physically located in the originating callers local calling area, yet the originating call to the VNXX is considered local from the caller's perspective. This differs from traditional local calling where the called NXX and callers NXX resides within the same local calling area.

resolution of the issue in the *Intercarrier Compensation NPRM*. In their comments Pac-West and O<sup>1</sup> criticized this result. In the FAR the Arbitrator reversed the outcome and adopted Pac-West's resolution of the issue, denying SBC compensation for VNXX traffic, subject to revision during the term of the ICA on the basis of changes occasioned by future decisions of the FCC or this Commission. SBC objects that this outcome is contrary to a previous Commission decision, Decision (D.) 99-09-029, and three Commission arbitration decisions based upon that rulemaking.

In its comments Pac-West defends the result reached in the FAR on this issue, principally because SBC cannot differentiate local from VNXX calls when they are handed off to Pac-West, and—more importantly—because SBC essentially incurs the same cost to originate calls of either type. The reason lays in the specific nature of the network interconnection design, which requires SBC to long-haul virtually all calls to Pac-West in order for Pac-West's switch in one of three locations to route the call over its system to its customer<sup>4</sup>. Consequently, claims Pac-West, the destination of calls originated by SBC is immaterial from the cost standpoint, and any differences are *de minimis*, because they represent only the cost differential between two alternative intra-LATA long-haul routings.

True, SBC cannot differentiate the traffic it hands off to Pac-West that is destined for the originating rate center (local NXX) from interexchange traffic destined 16 miles away from the originating rate center (VNXX). However, Pac-West clearly knows where it terminates the traffic it receives from SBC. It is irrelevant whether the traffic Pac-West terminates to its customer is a voice call,

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<sup>4</sup> FCC rules provide that carriers are allowed at least one point of interconnection within a local access transport area.

or is handed off to the Internet or a private network. The rate area associated with where Pac-West delivers traffic to its customer is the relevant "termination point" for transport rating purposes.

Since Pac-West knows to where it terminates traffic for its customers, Pac-West is capable of identifying the amount of traffic that is returned to the originating rate center (local NXX), and the amount of traffic it terminates which is interexchange - more than 16 miles away from the originating rate center (VNXX). Indeed, the concept of an interconnecting carrier having to identify traffic for purposes of rating by the local carrier is already an industry practice. InterExchange Carriers (IECs) identify the amount of interstate and intrastate traffic that they receive or terminate, thereby identifying the applicable interstate or intrastate "special access" charges the local carrier will assess upon them. In the case before us, Pac-West can similarly identify to SBC the amount of traffic terminated within 16 miles of the originating rate center, and the amount terminated 16 miles away from the originating rate center.<sup>5</sup>

Second, we do not agree with Pac-West that the costs are *de minimis*. Clearly, uncompensated costs are borne by the originating network provider and Pac-West's claim that a cost differential for VNXX must be found is a red herring.<sup>6</sup> Regardless of whether the traffic's eventual destination is the originating local calling area or a VNXX destination, we would expect the transport cost between SBC and Pac-West to be the same. We overturn the

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<sup>5</sup> The ICA includes auditing procedures and non-disclosure agreements necessary to protect confidential/proprietary information.

<sup>6</sup> SBC carries the traffic over its system after the hand-off; it does so under entirely separate compensation arrangements that are not in controversy.

result reached by the Arbitrator on this issue, because contrary to the FAR, there is no need for SBC to explain whether its cost of transporting traffic to Pac-West will differ based on where Pac-West delivers it. The Commission in an arbitration decision between Level 3 and Pacific Bell (prior to SBC-California) already addressed this issue. Decision 01-02-045, states;

"D.99-09-029 granted Level 3 the right to assign routing and rating points and provide Virtual NXX service, so long as Pacific is fairly compensated. Pacific showed that it has uncompensated costs when carrying calls for Level 3's Virtual NXX customers. Therefore, Level 3 must compensate Pacific for the use of Pacific's facilities regardless of whether or not Pacific incurs additional costs when transporting Level 3's Virtual NXX traffic.

Third, the FAR incorrectly places relevance in the argument of Pac-West that its situation is quite different from GNAPs which sought to establish LATA-wide "local" service via VNXX, because Pac-West provides various types of local services through disparate rating and routing, and that these services are offered using the traditional local calling areas of SBC for purposes of defining local and toll traffic. It is irrelevant how Pac-West's and GNAP's service offering differ. At issue is whether SBC should, or should not be compensated for the costs to deliver to Pac-West VNXX traffic, which by the nature of its termination outside of the originating calling area it is interexchange traffic, although it is rated as a local call to the calling party.<sup>7</sup> In this case, it is relevant that Pac-West and GNAPs similarly intends to offer VNXX services to its customers, and that each did not wish to pay for interexchange transport for VNXX traffic. Because Pac-

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<sup>7</sup> Pac-West argues that transport charges are paid by the originating call, telephone subscriber. This may be true to a very limited extent that local exchange costs include interexchange costs within the local calling area. However, transport costs outside the local calling area are excluded.

West terminates some traffic within the originating local area, it does not have to pay for such transport from the ILEC to the Pac-West POI. The fact that GNAPs did not intend to offer a local NXX service, but only to offer "virtual local service" via VNXX is irrelevant.

The Commission in deciding prior arbitration agreements concluded that CLECs would be absolved from paying the costs associated with transport from origination to their point of interconnection on the condition that the disparately rated and routed traffic was returned and terminated within the rate area where the local call originated. For foreign exchange type of service, where the traffic does not return to the originating rate center, such traffic would be subject to transport charges.<sup>8</sup> These policies are clearly elucidated by the Commission in D. 02-06-076;

The calling areas adopted by the Commission govern whether a call is local or an intraLATA toll call. Any call rated as an intraLATA toll call under the Commission's established calling areas would constitute exchange access traffic, not local traffic. (p.20)

"(W) e have no intention of making a decision in an arbitration proceeding that would have the net result of abolishing intraLATA calling. For calls that are intraLATA in nature, e.g., those beyond 16 miles, traditional access charges will apply." (p.24)

Additionally, the Commission's local compensation rules require the originating call carrier to compensate the CLEC for terminating the "local" traffic,

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<sup>8</sup> See GNAPs Arbitration Decision 02-06-076, pp. 25-30.



including VNXX traffic that is disparately rated and routed, as in a foreign exchange (FX) service.

Decision 02-06-076, page 28, states;

"...VNXX calls would be intraLATA calls, not local calls, if tied to the rate center that serves the customer. By allowing disparate rating and routing, we are allowing for those calls to become local calls, and as such, subject to reciprocal compensation. However, GNAPs is required to pay the additional transport required to get those calls where they will be considered local calls. ...This is similar to the concept of the ILEC's tariffed FX service, in which the customer pays for the privilege of receiving dialtone from a different exchange. Because these calls would be intraLATA toll calls, if they were rated out of the rate center, which actually provides service to the customer, they are not subject to the provisions of Rule 703(b)."

The rationale supporting the premise of the ILEC not having to pay for transport for disparately rated and routed "local calls" was based on a quid pro quo that the CLEC bears the cost of returning the traffic from its point of interconnection to the local calling rate center.<sup>9</sup> This "quid pro quo" policy promotes local competition and improves the opportunity for CLECs to utilize one point of interconnection to serve each of the rate centers within the LATA. Thus, CLECs have to balance the investment cost of adding a point of interconnection with the cost of purchased transport, leased or otherwise, from their switching facilities to the end user.

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<sup>9</sup> FCC Rule 51.703(b) forbids the ILECs from assessing any charges to transport "local" traffic, which is subject to reciprocal compensation provisions. However, Interexchange traffic is not subject to the Telecommunications Act's reciprocal compensation requirements. The California Commission determined that disparately routed, local calls and VNXX calls are subject to reciprocal compensation, not the FCC.

The prior arbitration decisions reflect a consistent Commission application of the principle of cost causation. The principle would be violated if the Commission allowed competitors to avoid paying for transport over another carrier's network in order to long haul interexchange traffic terminated in disparate rate centers. To allow such long-haul transport without transport compensation would be unfair for the ILEC, which bears the cost of its transport network. Further, such a policy in regards to VNXX, once widely adopted by the CLEC industry would potentially result in a shift in the cost of such transport to local exchange subscribers rather than to the subscribers of VNXX service which is the beneficiary of the foreign exchange like service.<sup>10</sup>

Pac-West has developed its VNXX product largely to serve its ISP customers, a substantial part of its business. VNXX is a valuable service that subscribers are willing to pay a premium for. Such service rates should bear the costs associated with provisioning the service. SBC offers a similar product as foreign exchange service. The FAR would have SBC provide transport services for non-local VNXX traffic without charge to its competitors while bearing the full cost of transport for provisioning its own foreign exchange service. Such a scenario is unreasonable. CLECs are free to compete utilizing wholesale services of the ILEC, other CLEC transport providers, or to provision transport services themselves.

The policies of this Commission and the Telecom Act precisely intends for carriers to invest in facilities based on the innovation incentives inherent in an openly competitive market. We refrain from creating an incentive that distorts

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<sup>10</sup> ILECs could claim transport costs should be allocated to local calling costs in any proceeding addressing local exchange costs.

marketplace investments by requiring incumbents to either subsidize its competitors' or shift costs to local exchange customers for inter-exchange traffic that is destined beyond the origination rate center. Such policy would encourage CLECs to become providers of termination facilities, to collect reciprocal compensation and thereby avoid investment in multiple points of interconnection, switching, and transport, and result in less network redundancy than facilities based competition economics would otherwise dictate. The competitive challenge is both on the CLECs and ILECs to invest wisely in origination and termination facilities.

**b. Approval of the Agreement**

Rule 4.2.2 specifies that our approval or rejection of an arbitrated ICA must be “pursuant to [Telecommunications Act Subsection] 252 (e) and all of its subparts.” Rule 4.2.3. articulates standards under that statute for conducting our review: we may reject the ICA if it does not meet the requirements of Section 251; specific pricing standards set forth in that section; the FCC’s implementing regulations prescribed under that section; or other requirements of this Commission, including quality of service standards we have adopted. Taken together, this means that we must examine the ICA to ascertain that it comports with Section 252 (d) and (e), Section 251 and the FCC rules thereunder, and our own regulatory requirements, but that we may also exercise our discretion in applying the standards and granting approval.

We have examined the conformed agreement filed by the parties, and have determined that approval with modification to Issue 14, should be granted. The pricing provisions comply with the standards for interconnection and network element charges, as well as the charges for transport and termination of traffic, under Section 252(d). The ICA does not discriminate against nonparties, and is consistent with the public interest, convenience and necessity, and thus comports

with Section 252 (e)(2)(A). It also satisfies the requirements of Section 251 and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B). Lastly, the agreement satisfies our own regulatory requirements. In making these determinations we have considered the controversy concerning Issue 14, as discussed above. We will approve the ICA with modification of Issue 14.

Rule 4.2.4 requires a decision approving or rejecting an arbitrated ICA to contain written findings.<sup>11</sup> Consistent with this rule, we include findings in support of our order.

### **Comment on Draft Decision**

Comments were received on February 20, 2003 from Pac-West Telecomm, Inc., O<sup>1</sup> Communications, Inc., Verizon California, Inc., and SBC-California. Pac-West states that "the Brown Alternate would impose approximately \$40 million of additional costs on Pac-West, a company that cannot absorb such a massive cost increase and survive"<sup>12</sup>. In hearings, a Pac-West witness testified that it could avoid the \$40 million expense by reconfiguring its network with POIs located at network tandems at a cost of \$12 million.<sup>13</sup> Pac-West has a choice to either reconfigure its network or to pay transport costs for VNXX calls, however reconfiguring a network takes time. To provide Pac-West sufficient time to reconfigure its network, for purposes of this interconnection agreement, the

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<sup>11</sup> Section 252(e)(1) of the Act only requires us to include written findings as to any deficiencies in the ICA.

<sup>12</sup> See Comments of Pac-West Telecomm, Inc, on the Alternate Draft Decision of Commissioner Brown, p.2.

<sup>13</sup> See Testimony of Mr. Sumpter, 6 Tr. 693.

applicable transport rates shall be effective upon January 1, 2004, on a going forward basis.

We recognize the FCC could change this VNXX transport charge policy. When the FCC acts on it Intercarrier Compensation NPRM, regarding the VNXX issue, such outcome shall be reflected in this ICA via its Change in Law provision.

### **Assignment of Proceeding**

Carl Wood is the Assigned Commissioner and Victor Ryerson is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. Pac-West can identify to SBC the amount of disparately rated and routed traffic that Pac-West terminates within 16 miles of the originating rate center in order to avoid inappropriate assessment of interexchange transport charges.

2. The Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Pacific Bell Telephone Company d/b/a SBC-California and Pac-West Telecomm, Inc. (ICA), filed by the parties on November 26, 2002, pursuant to Rule 4.2.1 conforms to the Final Arbitrator's Report in this proceeding.

3. The pricing provisions of the ICA with modification to Issue 14, per this order, comply with the standards for interconnection and network element charges, and the charges for transport and termination of traffic, under Section 252(d) of the Act.

4. The ICA does not discriminate against nonparties, and is consistent with the public interest, convenience and necessity, and thus comports with Section 252 (e)(2)(A) of the Act.

5. The ICA satisfies the requirements of Section 251 of the Act and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B).

6. The ICA satisfies the Commission's regulatory requirements, as reflected in its rules, decisions, and orders.

**Conclusions of Law**

1. SBC is entitled to receive compensation at UNE prices for facilities used per D.99-09-029 at 32, Decision 00-08-011 at 18, and Decision 02-06-076, at 28.

2. The UNE transport rates applicable in this order should become effective January 1, 2004.

3. It is appropriate that VNXX traffic be subject to reciprocal compensation.

4. The Commission should approve the ICA.

**O R D E R**

**IT IS ORDERED** that:

1. The Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Pacific Bell Telephone Company d/b/a SBC-California and Pac-West Telecomm, Inc., filed by the parties on November 26, 2002, is approved with modification to Issue 14.

2. To avoid paying the costs associated with transport from origination to their point of interconnection, Pac-West shall disclose to SBC the percentage of disparately rated and routed traffic that was returned and terminated within the rate area where the local call originated.

3. The UNE transport rates applicable in this order shall be effective upon January 1, 2004, and on a going forward basis

4. Parties shall modify the agreement in conformance with this order and shall file it in this docket within 7 days. A copy shall be provided to the Director

of the Telecommunications Division. The signed ICAs shall become effective on the date filed.

5. Application 02-03-059 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Draft Decision of Commissioner Brown on all parties of record in this proceeding or their attorneys of record.

Dated February 11, 2003, at San Francisco, California.

/s/ Vana White

Vana White

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.